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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND JUNIOR CAUDILLO III et al., Defendants and Appellants.	C077673 (Super. Ct. Nos. CRF131501, CRF131591)

Defendants Raymond Caudillo III and Eladio Tena, both teenagers and Norteño gang members, assaulted a mail carrier, breaking his cheekbone in three places. A jury found defendants guilty of assault with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4), count 1),[1] battery with serious bodily injury (§ 243, subd. (d), count 2), and active participation in a criminal street gang (§ 186.22, subd. (a), count 5).

[1] Further undesignated statutory references are to the Penal Code.

The jury also found true gang enhancements (§ 186.22, subd. (b)(1)(B) & (C)) to counts 1 and 2, and as to Caudillo found true the great bodily injury enhancement (§ 12022.7, subd. (a)) to count 1. The jury also found true the allegation allowing both defendants to be tried in adult criminal court. (Welf. & Inst. Code § 707, subd. (d)(1).) Caudillo was sentenced to 12 years in prison, and Tena to 4 years.

On appeal, Tena contends the trial court erred in failing to sever the gang participation crime and to bifurcate the gang enhancements. Caudillo contends it was error to allow impeachment of a witness with her misdemeanor convictions, but to exclude evidence of the conduct. He further contends the search of his cell phone without a warrant violated the Fourth Amendment. Each defendant joins in the arguments of the other. We affirm.

FACTS

The Assault

On June 20, 2013, Daniel Rivers was delivering mail in the area of Melton Drive in Yuba City. He heard a clinking sound that he thought sounded like BB's on metal. He saw a group of young Hispanic males drinking nearby. He lost his temper and yelled at them to stop shooting at the truck; they yelled back.

A short time later, Rivers stopped by the group to apologize for yelling at them. They told him to leave. Both Caudillo and Tena were by the mail truck. When Caudillo threatened to knock Rivers down, Rivers laughed off the threat and tried to leave. Tena said something to Caudillo about not letting Rivers get away with "that." Caudillo spit at Rivers and grabbed on to the handle at the back of his truck.

Caudillo ran or was dragged alongside the mail truck. When Rivers slowed, Caudillo made his way to the driver's door and punched him. Others joined in and hit Rivers several times. Rivers was "pretty positive" that Tena was one of the group that was hitting him. Someone hit Rivers very hard on the side of his face; it felt like a rock hit him. Rivers got away and drove to April Lane School where he called the police.

Rivers went to the hospital; he had sustained several blows to the face. His zygomatic arch, his cheekbone, was broken in three places and displaced. The zygomatic arch is seven to eight millimeters thick; it is one of the strongest bones in the face and hard to break.

Identification of Defendants

Rivers identified Caudillo as the person who initiated the attack. The police contacted Caudillo that night. He smelled of alcohol and said he saw the assault but took no part in it. He told the police he was an active gang member and would not "snitch" on his friends; he would rather go to jail. When the officer impressed on him the seriousness of the incident, Caudillo began to cry.

Caudillo's cell phone was seized. On it was a picture of Jeremiah Peno, a self-admitted Norteño gang member who had participated in the attack. [2] The phone also contained a video showing Tena with a BB gun. Tena's cousin told the police that he saw Tena that day with a BB gun, but he denied that statement at trial.

The police showed Rivers a photo lineup that night after he returned from the hospital. He was on pain medication and had difficulty focusing; he could not identify anyone. The next day, Rivers went to the police and identified Tena from a lineup.

Gang Evidence

Detective William Wolfe testified as a gang expert for the prosecution. He testified that in the Norteño gang respect is everything and insulting a gang member is considered the worst thing to do. The retaliation for an insult would be violent and a gang member would lose respect if he failed to retaliate. He testified the Norteño gang met the statutory definition of a criminal street gang and there were over 250 Norteños in

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[2] Peno was Caudillo's stepbrother and was convicted separately of this crime.

Sutter County. He described two predicate acts, both assaults, by other Norteño gang members.

Wolfe opined Caudillo was an active member of the Norteño gang. His opinion was based on Caudillo's admission of gang membership, his tattoos, the circumstances of the crime, and field investigative reports. Caudillo had many tattoos. Some indicated he was from San Jose. Others related more directly to the Norteño gang. He had four dots on his left wrist; his right knuckle said "thug," while his left knuckle said "life," indicating the gang lifestyle. Tattooed in red on his right shin was a one, there was a four on his left shin. His Mongolian hairstyle, with the ponytail beginning on top was associated with Norteños.

Wolfe opined that Tena was an active member of the Norteño gang, although he had never admitted active gang participation. Wolfe's opinion was based on Tena's tattoos, numerous filed investigative reports in which Tena was in the company of known gang members, and the circumstances of the crime. Tena had a tattoo of "YC" for Yuba City on his chest and there was a picture of Tena making the YC sign. His Facebook page showed Tena with gang members and in gang clothing. Wolfe testified that a non-active gang member or wannabe would never "egg on" a gang member in the manner the testimony indicated Tena had challenged Caudillo to respond to the victim's laughter.

Wolfe also opined that the crime benefitted the Norteño gang by instilling fear and intimidation, allowing the gang to become more powerful. The crime assisted the gang as it was an act of violence dispensed quickly and publically after an insult, Rivers laughing at Caudillo. He also testified that both Caudillo and Tena committed the crime in association with other Norteño gang members; Caudillo was a self-admitted gang member, Tena was a documented gang member, and Peno was self-admitted.

The Defense

Mitchell Eisen, who holds a Ph.D. in psychology and has expertise in eyewitness memory and suggestibility, testified for the defense about problems with eyewitness identification. He testified about the various biases involved in eyewitness identification.

Elizabeth Blackmon lived near where the assault took place. She testified she saw the mailman arguing with the people next door. She heard Caudillo repeatedly say, "We don't want no problems." The mailman left and came back, engaging Caudillo in an argument and pushing him. The mailman said, "yeah, that's what I thought" and laughed before he got in his truck. Caudillo's leg got caught under the truck and the mailman dragged him a bit. Caudillo was yelling to stop. Blackmon did not see Caudillo hit the mailman. She testified the mailman punched a guy on crutches and a fistfight followed. Caudillo did not join in the fight.

Blackmon was impeached with three misdemeanor convictions--filing a false report in Michigan and two burglaries. She was also impeached with her contradictory statements to Detective Wolfe. Although Blackmon claimed Wolfe tried to manipulate what she said, Wolfe testified in rebuttal that Blackmon was cooperative at first but then became argumentative. Her statements were vague and not detailed. She finally said she was *not* paying attention; she did not associate with the people involved, and it was a bad neighborhood.

Daniel Vasquez was a consultant who had been a correctional officer and warden; he testified as a gang expert for the defense. He discussed the difference between looking like a gang member and being a gang member. Gang membership is shown through conduct, not clothes or tattoos. In his opinion, this crime did not benefit the gang. He opined that Tena was not a gang member and Caudillo was a wannabe, on the periphery of the gang.

DISCUSSION

I

Sever/Bifurcate Gang Crime and Enhancements

Tena contends the trial court prejudicially erred in refusing to sever the gang participation count and to bifurcate the gang enhancements. He contends the gang evidence was unduly prejudicial and served only to support the People's "theory" that a gang motive--retaliation for disrespect--was the motive for the assault. He argues this is not the typical gang case where the gang motive is apparent, such as where the motive is to establish territorial dominance, retaliate against a rival, or punish an informant. Caudillo joins this contention.

A. *Background*

Prior to trial, Tena moved to "bifurcate" the gang crime and enhancement.[3] Tena argued there was no evidence that gang membership had been interjected into the crime. He argued the admission of gang evidence, particularly Caudillo's admission of gang membership, would prejudice him as guilt by association. He argued the gang evidence was irrelevant to motive. At the hearing on the motion, he stressed there was nothing in the case that showed it was gang related: "it's a very a simple assault and battery case."

The People argued the evidence of gang participation was the same evidence that would be used to prove the assault charges. The People asserted the gang evidence was admissible to prove motive; the gang expert would explain the concept of respect and the retaliation after Rivers laughed at Caudillo.

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[3] On appeal the parties agree the proper procedure is to sever a count and to bifurcate an enhancement. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 946, fn. 5.) Bifurcation and severance are not the same; "severance requires selection of separate juries, and the severed charges would always have to be tried separately; a bifurcated trial is held before the same jury, and the gang enhancement would have to be tried only if the jury found the defendant guilty." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1050 (*Hernandez*).)

The trial court noted the motion was only for bifurcation and asked Tena's counsel if she was asking the court to rule on a motion to sever. She responded she was asking the court to rule only on bifurcation. "If Your Honor believes that the defense needs to file a motion to sever, then we can do that on another day." The court stated a motion to sever was not before it and denied the motion to bifurcate, finding gang evidence would be admissible in the case.

B. *Law and Analysis*

1. *Severance*

" 'The law prefers consolidation of charges.' " (*People v. Manriquez* (2005) 37 Cal.4th 547, 574.) The gang participation count was properly joined with the assault charges as they arose from the same facts. "An accusatory pleading may charge two or more different offenses connected together in their commission." (§ 954.) "The benefits to the state of joinder [are] significant. Foremost among these benefits is the conservation of judicial resources and public funds. A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process." (*People v. Bean* (1988) 46 Cal.3d 919, 939-940.) Due to the legislative preference for joinder, "[t]he burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*Id.* at p. 938.)

"We review the trial court's denial of a severance motion for abuse of discretion." (*People v. Smith* (2007) 40 Cal.4th 483, 510.) "The pertinent factors are these: (1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) is

any one of the charges a death penalty offense, or does joinder of the charges convert the matter into a capital case." (*People v. Marshall* (1997) 15 Cal.4th 1, 27-28.)

First, we find Tena forfeited the issue of severance. Generally, the failure to raise an issue in the trial court forfeits that issue for appellate review. (*People v. Saunders* (1993) 5 Cal.4th 580, 589.) Because Tena never moved to sever, and expressly told the court he was not seeking a ruling on a motion to sever, the point has been forfeited.

Even if we treat Tena's motion to bifurcate as a motion to sever, he has failed to carry his burden to show error. "If the evidence in each case is shown to be cross-admissible in the others, ordinarily any inference of prejudice from joinder of charges is dispelled." (*People v. Sully* (1991) 53 Cal.3d 1195, 1222.) Much of the evidence to prove the gang participation charges was the same as that to prove the assault charges. The additional evidence for gang participation--the gang evidence--was admissible to show the motive of the assault. While motive is not an element of the crime, it is "always relevant." (*People v. Perez* (1974) 42 Cal.App.3d 760, 767.) "Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167.) Here, the gang evidence was admissible to help explain defendants' extreme and violent response to the ordinary and slight indignity of being brushed off with a laugh.

"Even if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

Tena relies on *People v. Albarran* (2007) 149 Cal.App.4th 214, to show the unfair prejudicial effect of the gang evidence. In *Albarran* two Hispanic males, defendant and an unknown man, fired guns at a house. (*Id*. at pp. 217-219.) Prior to trial, the court ruled that the proffered gang evidence was relevant not only to the gang enhancement but also to the issues of motive and intent for the underlying charges. (*Id*. at p. 220.) The

jury found the defendant guilty of the charged offenses and found the gang enhancement allegations true. (*Id*. at p. 222.) On a motion for a new trial, the trial court found there was insufficient evidence to support the gang findings and they were dismissed without prejudice. (*Ibid*.)

The *Albarran* court held that, even if some of the gang evidence was relevant to the issues of motive and intent, other "extremely inflammatory" gang evidence was admitted which had no relevance to the underlying charges. (*People v. Albarran*, *supra*, 149 Cal.App.4th at pp. 227-228.) This inflammatory gang evidence included gang graffiti of threats to kill police officers, defendant's tattoo showing allegiance to the violent prison gang the Mexican Mafia, and descriptions of other gang members and their arrests. (*Id.* at pp. 220-221.) The court concluded this evidence "had no legitimate purpose" in the trial and posed the danger "that the jury would improperly infer that whether or not [defendant] was involved in these shootings, he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished." (*Id*. at p. 230.) "This case presents one of those *rare and unusual occasions* where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*Id.* at p. 232, italics added.)

We find *Albarran* distinguishable; this is not one of those rare and unusual cases. Unlike in *Albarran*, here defendants were charged with and convicted of gang participation, as well as gang enhancements, and neither defendant challenges the sufficiency of the evidence supporting those charges. Further, the gang evidence explained the reason for the assault. Thus, the gang evidence was more probative and relevant than seen in *Albarran*. Moreover, the gang evidence was not as prejudicial as in *Albarran*. The evidence of the predicate acts by fellow Norteños, to establish the pattern of criminal activity of the Norteños, were assaults and no more inflammatory than the evidence of the crimes at hand. (See *Hernandez, supra,* 33 Cal.4th at p. 1049 [unduly

prejudicial evidence of predicate acts may warrant bifurcation of gang enhancements].) Most of the gang evidence related to evidence specific to the two defendants. There was no gratuitous evidence of other violent activities of other gang members. Although there was mention of the Mexican Mafia, it was in reference to the history of the gang, not defendants' allegiance.

2. *Bifurcation*

Section 1044 vests the trial court with broad discretion to control the conduct of a criminal trial and provides authority for bifurcating gang enhancements. (*Hernandez, supra,* 33 Cal.4th at pp. 1048-1049.) But "less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation." (*Id.* at p. 1048.) There is less need because "[a] prior conviction allegation relates to the defendant's *status* and may have no connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*Ibid.*)

The *Hernandez* court noted that although "[t]he analogy between bifurcation and severance is not perfect," "much of what we have said about severance is relevant here." (*Hernandez, supra,* 33 Cal.4th at p. 1050.) Much of the evidence supporting the gang enhancements was relevant and admissible to prove the assault offenses, and *all* of it was relevant and admissible to prove the gang participation charge. For the reasons stated *ante*, "defendants did not meet their burden 'to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.]" (*Id.* at p. 1051.)

II

Impeachment with Misdemeanor Convictions

Caudillo contends the trial court erred in allowing defense witness Blackmon to be impeached with her misdemeanor convictions, but then preventing the defense from inquiring as to the underlying conduct of those convictions. He contends the latter error

violated both the truth-in-evidence provision of article I, section 28 of the California Constitution and his federal constitutional right to present a defense.[4] He asserts these errors were prejudicial under any standard of harmless error because Blackmon was *the* crucial witness for the defense. Tena joins this contention.

A. *Background*

Before trial, the People moved to impeach Blackmon with her misdemeanor convictions. Caudillo argued that because the crimes were misdemeanors, impeachment could not be by a certified record of the conviction; the law required admissible evidence of the conduct. The prosecutor argued the law permitted impeachment with a felony or misdemeanor certified conviction, and that the People were *not* permitted to "prove up the underlying facts." The prosecutor, however, offered Blackmon's admissions to Wolfe as evidence rather than certified conviction documents. The trial court ruled evidence of Blackmon's misdemeanor convictions admissible over a defense objection based on Evidence Code section 352.

After the People rested, Caudillo renewed his motion to limit impeachment of Blackmon. Citing *People v. Wheeler* (1992) 4 Cal.4th 284 (*Wheeler*), he argued evidence of a misdemeanor conviction itself is inadmissible hearsay; the underlying conduct is admissible if it is a crime of moral turpitude. The People argued that pursuant to *People v. Duran* (2002) 97 Cal.App.4th 1448, the Legislature created a hearsay exception for certified court records of convictions in Evidence Code section 452.5. The People proposed to question Blackmon about the three misdemeanors, if she denied the California convictions, the People would ask the court to take judicial notice of the

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[4] Although defendant now contends the errors are of constitutional magnitude, he failed to make this claim in the trial court. "Assuming the claim was properly preserved for appeal [citation], defendant's constitutional claims fail on the merits because, generally, violations of state evidentiary rules do not rise to the level of federal constitutional error." (*People v. Benavides* (2005) 35 Cal.4th 69, 91.)

conviction documents. If Blackmon denied the Michigan conviction, Detective Wolfe would impeach her with her prior admission. The trial court accepted that procedure for the California convictions, but requested more information as to the definition of the crime of the Michigan conviction.

Blackmon was called as a witness for the defense; during her direct testimony she was asked by defense counsel about these crimes and admitted she had been convicted of three misdemeanors--a false report of a crime in Michigan and two violations of section 459, second degree. The prosecutor objected when defense counsel asked the circumstances of the false report, and the trial court sustained the objection. On cross-examination, the prosecutor clarified that the section 459 offenses were burglary.

B. *Admission of Fact of Conviction*

"[I]f past criminal conduct amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion, as 'relevant' evidence under section 28(d)." (*Wheeler, supra,* 4 Cal.4th at p. 295.) "Misconduct involving moral turpitude may suggest a willingness to lie [citations], and this inference is not limited to conduct which resulted in a felony conviction." (*Id.* at pp. 295-296.) The *Wheeler* court held that while misdemeanor conduct may be admissible for impeachment, "evidence of a misdemeanor *conviction*, whether documentary or testimonial, is inadmissible hearsay when offered to impeach a witness's credibility." (*Id.* at p. 300.) The court noted the Legislature is not "precluded from creating a hearsay exception that would allow use of misdemeanor conviction for impeachment in criminal cases." (*Id*. at p. 300, fn. 14.)

In 1996, the Legislature enacted Evidence Code section 452.5. (Added by Stats. 1996, ch. 642, § 3.) Subdivision (b) of Evidence Code section 452.5 creates a public records hearsay exception for a certified official record of conviction "to prove the commission, attempted commission, or solicitation of a criminal offense, prior

conviction, service of a prison term, or other act, condition, or event recorded by the record."

In *People v. Duran, supra,* 97 Cal.App.4th 1448, the appellate court concluded that Evidence Code section 452.5 created the hearsay exception referred to in *Wheeler*. "[W]e conclude that Evidence Code section 452.5 states a new hearsay exception for certified official records of conviction, which may be offered to prove not only the fact of a conviction, but the commission of the underlying offense." (*Duran,* at p. 1461; see also *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522, fn. 8 [section 452.5 "allows prior misdemeanor conduct to be proved by official records of misdemeanor convictions"].)

Here, however, the prosecutor did not produce certified records of conviction to prove Blackmon's misdemeanor conduct. Instead, the trial court permitted the prosecutor to prove the convictions through cross-examination of Blackmon, and offer the certified records (which the prosecutor did not even have for the Michigan conviction) as evidence. Faced with this ruling, the defense asked Blackmon about her misdemeanor convictions on direct examination.[5] She admitted the convictions, thus no records of conviction were introduced into evidence. The effect was that only the *fact* of the conviction, not the underlying *conduct,* was admitted at trial. As the People concede, this was error. (*Wheeler, supra,* 4 Cal.4th at p. 300.)

C. *Prejudice*

Under the *Watson* standard for reviewing state law evidentiary error, reversal is required only if there is a reasonable probability the error affected the verdict adversely to the defendant. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

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[5] As the People commendably concede, under the defensive acts doctrine "a defendant should not lose his right to contest an erroneous ruling by the trial court merely because the defendant thereafter acts prudently to mitigate the adverse effects of that ruling." (*People v. Eilers* (1991) 231 Cal.App.3d 288, 297.)

The People contend that Caudillo has failed to establish prejudice because Blackmon's testimony was of little evidentiary value. They argue the evidence against defendants was overwhelming, and contend that if the proper procedure had been followed, the jury would still have learned that Blackmon was a liar and a thief. They add that her testimony was riddled with inconsistencies and at odds with Caudillo's statements about the incident.

Caudillo stresses the importance of Blackmon's testimony to the defense; he contends that if the jury had believed her, it would not have convicted him. He also contends the jury had no chance to learn what second degree burglary was or to whom Blackmon made the false crime report. He claims *Lopez* is analogous.

In *Lopez*, the prosecutor impeached defense witnesses with their misdemeanor offenses and their arrests. (*People v. Lopez*, *supra*, 129 Cal.App.4th at p. 1520.) In argument, the prosecutor asserted the multiple arrests gave these witnesses "an ax to grind" against the police and made them untrustworthy due to their run-ins with the police; in contrast, the prosecution witnesses had no contact with the police except to call about a disturbance. (*Id*. at p. 1521.) The reviewing court held it was error to admit the arrest evidence "due to the danger that it would be employed exactly as the prosecutor employed it—not simply to show that the witnesses might be biased against the police, but that each of them has an untrustworthy and criminal character." (*Id.* at p. 1523.) The court found counsel's failure to object to this inadmissible evidence prejudicial because these defense witnesses were crucial, the prosecutor urged the jury to disbelieve them for improper reasons, and the "unhindered excess undermines our confidence in the outcome." (*Id*. at p. 1524.)

We find *Lopez* distinguishable. No inadmissible arrest evidence was involved here; the California misdemeanor convictions would have been properly admissible if the procedure set forth in Evidence Code section 452.5 had been followed. Caudillo fails to show that the conduct underlying the California misdemeanors would be less prejudicial

than the convictions. Further, unlike *Lopez*, the prosecutor here did not focus on the convictions to argue Blackmon's testimony should be disbelieved. While she mentioned the prior convictions, she argued Blackmon was not credible because she was afraid to testify against the gang and focused her argument on the inconsistencies between Blackmon's testimony and the other evidence in the case.

The credibility of Blackmon's testimony that Rivers, rather than Caudillo, was the sole aggressor was significantly weakened by the evidence of her interview with Detective Wolfe. She admitted to Wolfe that she did not see the entire incident, her attention was diverted by her children, and she was not paying attention to the incident. She told Wolfe: "There were parts where I didn't see hardly anything at all" and "I didn't know what had initiated it or what caused it." Wolfe testified Blackmon became argumentative as he pushed her for details. She did not tell him that Rivers pushed Caudillo and she could not explain how Caudillo ended up in the wheel well of the mail truck.

Given the other reasons for doubting Blackmon's testimony, there is not a reasonable probability of a more favorable result for Caudillo had the evidence of her misdemeanor convictions not been admitted. The error was harmless.

III

Search of Caudillo's Cell Phone

Caudillo contends the trial court erred by denying his motion to suppress evidence obtained in the search of his cell phone. He contends the warrantless search cannot be justified as a search incident to arrest because the United States Supreme Court held in *Riley v. California* (2014) 573 U.S. ___ [189 L.Ed.2d 430] that this exception does not apply to cell phones. Nor can the search be justified based on the officer's belief that Caudillo was on probation because it was not an objectively reasonable belief due to the officer's failure to confirm Caudillo's true name. Tena joins this contention.

A. *Background*

While Caudillo was alone in the interview room at the police station, he removed his cell phone from his pocket and appeared to type or dial on it. Officer Oakley was monitoring the room and observed this action. He informed Officer Cromwell who entered the room, searched defendant, and seized the phone. Oakley then searched the contents of the phone and found pictures and a video.

Prior to trial, Caudillo moved to suppress the evidence obtained from the search and seizure of his cell phone. The People justified the search as a lawful search incident to arrest, citing *People v. Diaz* (2011) 51 Cal.4th 84.

At the hearing, Cromwell testified he asked Officer Sharma to go to Melton Drive to look for a suspect. Sharma radioed that he had a suspect matching the description given by Rivers and identified him as Raymond Caudillo, Jr. After Caudillo was transported to the police station, Cromwell ran the name Raymond Caudillo, Jr. through the system and learned he was on searchable probation.[6] Oakley told the court he searched the phone based on Sharma's information that Caudillo was on probation and "pursuant to the defendant's arrest."

The trial court denied the motion to suppress on the basis that the officer believed Caudillo was on probation and as a search incident to arrest.

B. *Warrantless Search of a Cell Phone*

"A warrantless search is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search." (*People v. Redd* (2010)

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[6] Defendant Caudillo's full name is Raymond Junior Caudillo III; Raymond Caudillo, Jr., is his father. Defendant Caudillo had no prior convictions and was not on probation. On appeal, the People seek to justify the search only under the good faith exception to the warrant requirement based on existing binding precedent that such a search was a lawful search incident to arrest. They contend the probation search issue is moot. Accordingly, we focus on the good faith issue.

48 Cal.4th 691, 719.) "The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

An established exception to the warrant requirement of the Fourth Amendment is "a search incident to a lawful arrest." (*United States v. Robinson* (1973) 414 U.S. 218, 235 [38 L.Ed.2d 427, 477].) "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." (*Id.* at p. 235.)

In *People v. Diaz, supra,* 51 Cal.4th 84, law enforcement officers conducted a warrantless search of the text message folder of defendant's cell phone approximately 90 minutes after lawfully arresting him and transporting him to a detention facility. Our high court held, "under the United States Supreme Court's binding precedent, such a search is valid as being incident to a lawful custodial arrest." (*Id.* at p. 88.)

In *Riley v. California, supra,* 573 U.S. __ [189 L.Ed.2d 430], decided after the trial in this case, the United States Supreme Court reached a different conclusion. It held "the search incident to arrest exception does not apply to cell phones." (*Id.* at p. __ [189 L.Ed.2d at p. 451].) Absent an exigency, a warrant was required to search a cell phone. (*Ibid.*) "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life,' [citation]. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant." (*Id.* at p. ___ [189 L.Ed.2d at p. 452].)

Under *Riley*, the warrantless search of Caudillo's cell phone violated the Fourth Amendment. The question is whether exclusion of the evidence seized is required.

C. *Good Faith Exception*

"The fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies." (*Herring v. United States* (2009) 555 U.S. 135, 140 [172 L.Ed.2d 496, 504].) "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." (*Id*. at p. 144 [172 L.Ed.2d at p. 507].)

In *Davis v. United States* (2011) 564 U.S. 229, 241 [180 L.Ed.2d 285, 297], the United States Supreme Court held the exclusionary rule does not apply to "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent." The court reasoned: "An officer who conducts a search in reliance on binding appellate precedent does no more than ' "ac[t] as a reasonable officer would and should act" ' under the circumstances. [Citation.] The deterrent effect of exclusion in such a case can only be to discourage the officer from ' "do[ing] his duty." ' [Citation.]" (*Ibid*.)

At the time of the search of Caudillo's phone, the California Supreme Court had held in *Diaz* that such a search was valid as a search incident to arrest. Accordingly, under *Davis*, the exclusionary rule does not apply.

Caudillo argues *Davis* does not apply because Oakley did not testify he actually relied on *Diaz*; he stated only that the search was "pursuant to the defendant's arrest." Nothing in *Davis* imposes the requirement that the officer *cite* to the relevant binding precedent. Rather, after reasoning that excluding evidence in cases where law enforcement has scrupulously adhered to governing law "deters no police misconduct and imposes substantial social costs" (*Davis v. United States, supra,* 564 U.S. at p. 249 [180 L.Ed.2d at p. 302]), the court reiterated its holding that "when the police conduct a search in *objectively* reasonable reliance on binding appellate precedent, the exclusionary rule

does not apply." (*Id*. at pp. 249-250 [180 L.Ed.2d at p. 302], italics added.) Here, Oakley's reliance on *Diaz* was objectively reasonable.

Caudillo further argues that the officers did not act in good faith and their conduct could be deterred by the exclusionary rule because they relied in part on the negligent belief Caudillo was on probation and they failed to confirm Caudillo's name and probation status. Whether the officers acted reasonably with respect to determining Caudillo's probation status is of no moment because there was, as we have explained, a valid basis for the search. (See *Brigham City v. Stuart* (2006) 547 U.S. 398, 404 [164 L.Ed.2d 650, 658] ["An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action' "].)

DISPOSITION

The judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Nicholson, Acting P. J.

/s/
Renner, J.